

To: DCMS
AVMS Directive implementation team
100 Parliament Street
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21 August 2019

Snap Inc response to ‘Audiovisual Media Services’ Consultation Document, May 2019

To Whom It May Concern,

Snap Inc welcomes the opportunity to provide comment on DCMS’ consultation on the transposition of the updated parts of the Audiovisual Media Services Directive (2018/1808).

Background to Snap

As a brief introduction, Snap Inc. is the camera company, that, as well as designing video camera hardware and augmented reality software, owns and operates the visual messaging platform, Snapchat. Snapchat was specifically designed as an antidote to social media. The platform is about sharing moments 1:1 or in small groups with your closest friends. It is a place for friends to communicate with one another and it has been designed without the public vanity metrics (‘comments’ ‘likes’ and ‘shares’) found on other platforms or newsfeeds through which users are continuously scrolling.

The UK is among Snap’s most significant international markets. We have around 12 million daily active users using the Snapchat platform, as well as two offices in London hosting 140 people across engineering, sales and marketing and various general and administrative functions. The company is small but growing and is becoming, we believe, a genuine challenger to the established tech giants that have dominated online media for the past decade.

We take our responsibility to create a safe and secure user experience seriously. One such example of this is the approach we take to the publicly available areas of our platform, most importantly “Discover”, which is fully curated and moderated. Discover allows users to enjoy trusted content from professional publishers, such as The Daily Telegraph, Vogue, The Mail Online, Sky News, and The Economist, as well as public accounts of celebrities and public officials.

Introduction

Turning to the issue at hand, the AVMS Directive's scope has rightly broadened as technology has been perceived to converge, with the aim of ensuring similar rules and protections for similar services irrespective of the medium. What has remained consistent throughout, however, is the Directive's focus on content which is "broadcast" (in the broadest sense of the word) to citizens. With the arrival of individual "pull" style, on-demand services, the Directive carefully understood and reflected the different assumptions citizens had of the different service types across different media. The latest revisions draw in, for the first time, content created by citizens themselves and distributed publicly, though again recognising that different assumptions call for a lighter touch than traditional "pushed" broadcast content.

These thoughtful and incremental developments proposed by the EU Commission and agreed by Member States, including the UK, are to be welcomed. It is important, however, that Member State transpositions take place in the spirit in which the Directive's amendments were agreed, in order for their value to be properly realised.

As the UK regulatory field impacting online content services becomes ever more complex with the development of both EU and domestic legislative and regulatory instruments, we urge the Government to take care to ensure there are no contradictions. It is vital that protections and responsibilities agreed in other instruments are not prejudiced during the transposition of this latest update. In this vein, and in line with the AVMSD itself, we recommend the Government considers the following:

- Ensure a clearer articulation of the AVMSD's new provisions to be covered in the UK Online Harms Bill, withdrawing proposed interim measures
- Commit to continued promotion of self- and, more importantly, co-regulatory regimes
- Provide an explicit carve-out for private (electronic) communications services and content contained therein
- Accelerate and mandate the promotion of digital media literacy and digital citizenship in all schools
- Ensure no further dilution or blanket derogatory qualification of the Country of Origin (CoO) principle
- Provide clear protections for the EU e-Commerce Directive's intermediary liability provisions

Online Harms White Paper / Bill

We have submitted our position on the OHWP to the relevant consultation in July. We, therefore, limit our comments here to the interaction of the AVMSD and OH Bill/Act in future. It is imperative that the Government puts in place a clear and fully coherent regulatory regime, particularly in terms of scope, for all types of publicly available broadcast-type media content, both offline and online. In this AVMS consultation, the Government has stated that the OH Bill/Act will deal with transposition of the responsibilities for video-sharing platforms (VSPs) in the new AVMSD. We believe this is the best way to proceed as it will avoid confusion among stakeholders, who are already engaged in the OHWP process.

We are, therefore, concerned by the supplementary consultation dedicated to VSPs subsequently issued in late July. It suggests a form of interim regime prior to the passage of the OH Bill through Parliament. This action, if carried through, will cause unnecessary complication, especially for smaller businesses who will have to go through two compliance reviews¹ and adjustments in short succession, adding to their cost burden. With the uncertainty surrounding Brexit already weighing on smaller businesses in the UK, we strongly urge the Government to reconsider this course of, seemingly unjustified, action.

Indeed, the sole justification we can see would be for the UK to avoid missing the transposition deadline of September 2020 for the AVMSD. Given the Government has committed to leaving the EU on 31 October 2019, this feels unnecessary and disproportionate. Even in the event the UK were not to leave the EU, or secured some kind of transitional arrangement whereby Directive transposition deadlines including the AVMSD needed to be adhered to, the normal procedure for a Member State would be to write to the EU Commission notifying them of a short delay to implementation and stating why (in this case, essentially, a lack of Parliamentary time to scrutinise a piece of overlapping domestic legislation - the OH Bill). The Commission is used to such temporary extensions. Creating interim rules for a few months will likely cause a lot of confusion and pain for smaller companies, create anti-competitive advantages for larger companies, stretch OFCOM still further resource-wise and do little for citizens.

Snap position: To avoid disproportionate market disruption and legislative confusion, we recommend the Government cancel the supplementary consultation and revert to its original goal of using the OH Bill as the vehicle to implement the new VSP provisions in the AVMSD.

Self- and co-regulation

The AVMSD envisages and encourages Member States to continue to develop and use self-and co-regulation. Thus far, ASA and CAP, overseen by OFCOM, have proven generally robust and successful for advertising. Specific gaps identified in the AVMSD, in particular with regard to certain types of advertising to minors, can be accommodated within the existing framework.

Regarding the new VSP category, we recommend the Government considers a similar co-regulatory setup preferably using existing institutions (eg ASA and OFCOM). It would be important, however, to incorporate the principle of proportionality into the rule-making process, given consumers have differing expectations of VSP based content compared to that of traditional linear TV or even video on demand (VoD). The process should also take into account the fact that designs and use cases vary widely among VSPs, impacting the applicability or effectiveness of the AVMSD's new functionality-specific provisions in some cases, such as the measures prescribed in Article 28b.

¹ Indeed, there are likely to be several more reviews for businesses large and small to deal with, given the following are in parallel being considered by the Government currently: Five Eyes Country Ministerial Voluntary Code against Child Sexual Exploitation; Home Office's two separate voluntary codes, under the auspices of the OHWP, against child sexual exploitation and terrorist content; DCMS' child safety online guidance, again under the auspices of the OHWP

Snap position: We encourage the Government to continue to develop the existing co-regulatory regime in a proportionate and appropriate manner. The more that existing, successful co-regulatory schemes can be leveraged, the better.

Private vs public communications services

It has been made clear in every iteration of the TV Without Frontiers and AVMS Directives that the focus is on public, broadcast-style content. In the age of convergence, however, the distinction between public and private risks becoming blurred in regulation, creating compliance uncertainty for businesses and risking unwarranted privacy intrusions for citizens. In order to avoid any confusion or over-reach into the private sphere, we recommend that the Government makes the scope of the new rules still more explicit than provided for in the Directive. The main domestic reason for this is the development of the OHWP, which too requires similar clarification. Thus far, the Government's exclusion of the private communications space from OHWP's scope has been correct in principle, but too vague in practice. As the OHWP develops into Bill form, the Government needs to be more specific in order to avoid confusion. In parallel, we would recommend this is repeated in the AVMSD transposition provisions.

As we stated in our most recent OHWP submission, "In order to avoid complex issues around defining "public" and "private", we would suggest using the EU's agreed definitions for "content" and, more importantly, "communications" in the context of EU law. Since the latter have been adopted through a variety of instruments overseen by OFCOM and the ICO, they provide a solid definitional basis for service exclusion. "Electronic Communications Service" (ECS) is the prime service category used to define the main types of communications services today. Sub-categories of ECS, such as "Interpersonal Communications Service (ICS) and Number Independent Interpersonal Communications Service" (NIICS), have been agreed at EU level in the new EU Electronic Communications Code and will be implemented in the UK and other Member States by the end of 2020. Creating a carve out from the Online Harms Bill/Act for these service types would be a simple and effective solution to exclude private communications from the scope of the new Bill."

This would be consistent with the carve-out in related instruments, such as the EU Copyright Directive, which similarly focus on the "broadcasting" of public content and the protection of rights surrounding such broadcasts to the public.

Snap position: A simple carve out for ECS - using the existing precedents established in EU law - would ensure the protection of citizens' private communications rights and better define the scope of the AVMSD's public broadcast-type coordinated field.

Media literacy

The AVMSD rightly re-states the importance of media literate citizens and puts the responsibility for that in the hands of Member State governments. Historically, it is now apparent that media literacy policy in the UK, particularly when it comes to online media literacy, has been of a lower priority to Government than the mandating of increased protections, despite these activities being essentially two sides of the same coin. In recent

months the Government has begun to treat the matter of building media literacy, resilience and agency in citizens sufficiently seriously. The previous Secretary of State for Education's mandating of digital citizenship lessons in schools as part of the revamp of Relationships and Sex Education programme is to be applauded and something to be built upon in coming months. However, OFCOM's statutory responsibility for media literacy has not developed over time; now is the time to give the regulator the resource and support to do much more. Ensuring all citizens - especially the young - understand not just how to navigate the online world safely and productively, but also grasp the judgement required to balance rights and responsibilities and why both are important, is vital to the functioning of society overall.

Snap position: Snap wholeheartedly supports increasing Government attention towards, and resource for, radically improving online media literacy and digital citizenship, especially among younger people. The proposals in the Online Harms White Paper (OHWP) to determine the objectives of a new online media strategy should be fast tracked by DCMS and OFCOM in order to accelerate future execution.

Country of origin (CoO) principle

The CoO has been a key driver of economic growth in the EU, allowing hundreds of thousands of businesses across the bloc access to a single, borderless market. The audiovisual sector is - or should be - no exception. At the same time, the CoO has ensured that adequate consumer protections and standards apply right the way across the Union, giving consumers the confidence to venture cross border for goods and services, increasing the value and choice available to them. In short, there is no down side to a robust CoO. The principle should be protected and derogated from only in the most exceptional circumstances.

Snap position: We broadly agree with the Government's approach. However, we encourage strong and clear guidance to OFCOM in terms of the implementation of any new derogations and unilateral measures for use in truly exceptional circumstances only, to avoid unnecessary disruption of internal market dynamics.

eCommerce Directive

The intermediary liability provisions of the EU eCommerce Directive have formed the bedrock of a regime which has successfully and enduringly balanced the protection of citizens/consumers with the acknowledgement that Internet hosting providers cannot know in advance from a practical perspective the legality, or otherwise, of all the content that is on their platforms. The AVMSD's existing and new provisions are explicitly without prejudice to these key provisions of the eCommerce Directive and it is important that the Government acknowledges this adequately in its AVMSD transposition. Such an acknowledgment would mirror that already made by the Government in the Online Harms White Paper, which is explicitly designed to be "compatible with the eCommerce Directive"².

² Online Harms White Paper (OHWP), page 9, para 41

Snap position: Make explicit “without prejudice” acknowledgement in statute to ensure the eCommerce Directive’s intermediary liability provisions continue to be protected, as provided for in the AVMSD itself.

Conclusion

In closing, we hope these comments prove useful to the Government in its deliberations on the AVMSD transposition and, relatedly, the OH Bill drafting process. We would be happy to discuss further any of the above points, should Government find that helpful. We will continue to engage constructively in all current and future consultations.

Yours faithfully,

Stephen Collins
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